U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 04 May 2007

CASE NO.: 2006-LHC-00401
OWCP NO.: 01-160197

In the Matter of

J. S.[1]
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

Scott N. Roberts, Esq., Groton, Connecticut, for the Claimant

Conrad M. Cutcliffe, Esq., Cutcliffe, Glavin & Archetto, Providence, Rhode Island, for the Employer

Before: COLLEEN A. GERAGHTY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The present matter is a claim for workers' compensation and medical benefits filed by J. S. (the "Claimant") against the Electric Boat Corporation ("EB" or the "Employer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing, which was conducted before the undersigned administrative law judge on July 25, 2006, in New London, Connecticut.

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

The Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer. The District Director of the Office of Workers' Compensation Programs did not appear at the hearing. At the hearing, the parties were afforded the opportunity to present evidence and oral argument. Testimony was heard from the Claimant. The Hearing Transcript is referred to herein as "TR." Documentary evidence was admitted as Claimant's Exhibits ("CX") 1-11 and 13[2] and Employer's Exhibits ("EX") 1-11. TR at 11, 14-16. Formal papers were admitted without objection as Administrative Law Judge Exhibits ("ALJX") 1-10. TR at 20-21. Thereafter, the parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant is entitled to permanent partial disability compensation benefits for a 26% permanent impairment of the left knee and a 7% impairment of the right knee.

My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties stipulated to the following: (1) The Act applies to the present claim; (2) an employer/employee relationship existed between the Claimant and EB; (3) the Employer was timely notified of the injury; (4) the claim for benefits was timely filed, and a Notice of Controversion was timely filed; (5) an informal conference was held on November 16, 2005; (6) the Claimant's average weekly wage was $789.16; (7) the Claimant has not been paid any compensation; (8) no medical benefits have been paid by EB; (9) the Claimant was never disabled because of his injuries; (10) the date of maximum medical improvement is September 24, 2004, the date of Dr. Willetts' medical report. TR at 4-6.

The remaining issues to be adjudicated at hearing are (1) causation, and (2) the nature and extent of the Claimant's disability.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant was sixty-three years old when he retired from his position as master plumber at EB in January 2006. TR at 26, 32. The Claimant started working at EB in 1974 as a plumber. TR at 26. He achieved master plumber status in 1975. TR at 26. The Claimant's job as a plumber at EB developed into a position that required him to work on the overhead sprinkler pipes, underground water and sewer pipes, the pumps and other associated equipment for the heating and plumbing systems, plus all of the bulk systems. TR at 27. The Claimant's position

[2] The Employer objected to Claimant's twelfth proposed exhibit, an affidavit of Claimant's counsel's staff person, Ms. Francis, stating that she spoke with a staff person in Dr. Paul Fadale's office, on the grounds that it is irrelevant and that the Employer was not given a copy of the proposed exhibit before the hearing, as required by the Pre-Hearing Order. TR at 9. I sustained this objection, and the exhibit was not admitted. TR at 10-11.

did not require him to work on the submarine itself, rather his job was to maintain all of the plumbing in approximately twenty buildings at the Quonset Point facility. TR at 27, 39. The Claimant testified that he could spend two to three hours per day walking and carrying tools back and forth to the different job sites. TR at 35. The Claimant's position required him to climb steel ladders and to crawl through the ceilings in order to reach water pipes and valves requiring repair. TR at 28. Additionally, the Claimant had to climb ladders and crawl through catwalks that were located sixty to seventy feet in the air to reach overhead heaters that required repair. TR at 28. In making repairs to the underground heating system, the Claimant operated a jackhammer to dig up the concrete floor, shut off the water or air, made the repair, re-cemented the floor, and turned the water or air back on. TR at 34. Additionally, the Claimant was responsible for maintaining underground pumps and had to work on his hands and knees to lift the pumps up from dark rooms to floor level in order to make the necessary repairs. TR at 34.

The Claimant testified that EB employed as many as thirty-five plumbers, pipefitters, and steamfitters in the mid-1980's. TR at 30. The Claimant held the job of foreman at EB for approximately ten years from 1982 to 1992. TR at 40. As foreman, the Claimant spent about one-half of his time supervising and spent the other half on physical work. TR at 41. In 1992, the Claimant was laid off, but within a few days, was rehired as a plumber to work as an hourly employee. TR at 35-37. The Claimant stated that due to lay-offs, most of the other plumbers, pipefitters, and steamfitters left over the last seven to nine years of the Claimant's employment. TR at 30-31. The Claimant stated that he was the last plumber working at the facility at the time of his retirement. TR at 30.

The Claimant testified that during the last three to four years of his job, he was charged with the task of identifying the overhead piping for all of the air and water mains in the various buildings at the Quonset Point facility for the purpose of updating the facility blueprints. TR at 29. This task required the Claimant to crawl on his hands and knees for "hours on end" through the ceilings to try to locate the air and water mains. TR at 29.

The Claimant sustained two work-related injuries to his right knee while employed by EB. TR at 37; CX 6 at 16, 18. The first right knee injury occurred on May 8, 1977, when he "banged his knee on a piece of pipe." CX 6 at 16. According to an EB medical dispensary report dated May 9, 1977, the Claimant was sent to the North Kingstown Medical Treatment Center for x-rays and evaluation because the Claimant was suffering from swelling and redness of the entire right knee. CX 6 at 16. The x-rays were negative for fracture, and the Claimant was diagnosed as having a contusion. CX 6 at 16. Although a note on the report says "no climbing," the same report also states that the Claimant could return to work. CX 6 at 16.

The second work-related injury to the Claimant's right knee occurred on May 5, 1981, when the Claimant was climbing up a ladder and banged his right knee on a steel rung. CX 6 at 18; TR at 38. A medical dispensary report dated May 6, 1981 states that the Claimant's right knee was swollen and discolored, and that he was sent to the North Kingstown Medical Treatment Center. CX 6 at 18. Another medical dispensary report dated May 8, 1981, states that the Claimant's knee was aspirated on May 6, 1981 due to this injury. CX 6 at 20. The Claimant was put on light duty from May 7-8, 1981, and the "Hospital Visit Report" dated May 7, 1981, specifically restricted the Claimant from climbing, crawling, and kneeling for two days. CX 6 at

20. The same report states that the Claimant could return to regular duty on May 9, 1981. CX 6 at 20.

The Claimant also sustained a sports injury to his left knee in 1979 that was not work related. TR at 42-43; CX 7 at 13. Due to the 1979 sports injury, the Claimant required knee surgery, which was performed by Dr. Knowles, to repair a medial collateral ligament. CX 7 at 13. The Claimant has two metallic staples in his left knee from the 1979 ligament repair surgery. CX 2 at 8. The Claimant was out of work due to the 1979 sports injury for seven or eight months, and returned to work without restrictions. TR at 32-33.

In approximately 1999 or 2000, the Claimant began noticing pain in both of his knees after prolonged kneeling at work. CX 2 at 1. In 2002, the Claimant was referred by Dr. Richard Leach, his primary care physician, to Dr. Vincent I. MacAndrew for an orthopedic evaluation of his knees, hip, and back. CX 2 at 1. According to Dr. MacAndrew's August 22, 2002 report, the Claimant's primary complaint at the time of his initial examination was for hip pain on his left side and he was "not having any knee pain per se." EX 5 at 1. However, the Claimant testified that his "knees were bothering him at the time." TR at 43. Additionally, at a subsequent examination with Dr. MacAndrew on November 5, 2002, a bone scan and MRI revealed that the Claimant had some arthritic changes to both knees. EX 5 at 3. Dr. MacAndrew's November 5, 2002 report states that the Claimant had no significant complaints of knee pain, but that he was taking chondroitin sulfate with glucosamine, which "ha[d] been helpful." EX 5 at 3. The Claimant testified that he was taking the chondroitin sulfate with glucosamine for pains in his "whole body." TR at 46. Dr. MacAndrew's November 5, 2002 report also notes that the Claimant had "seen improvement since he went down to Florida," and that Dr. MacAndrew thought "the weather change and diminished activity helped to alleviate [the Claimant's] discomfort." EX 5 at 3.

In 2004, the Claimant was examined by Dr. Philo F. Willetts, Jr., an orthopedic surgeon with Westerly Hospital, Westerly, Rhode Island, and solo practitioner of orthopedic surgery. CX 7 at 6. Dr. Willetts examined the Claimant on August 12, 2004, reviewed medical records regarding the Claimant, and issued a written medical report dated September 24, 2004. CX 2 at 1. Dr. Willetts diagnosed the Claimant as having degenerative arthritis of the right knee subsequent to the 1981 work injury that required the Claimant to have fluid aspirated from his right knee. CX 7 at 13. With regard to the Claimant's left knee, Dr. Willetts diagnosed the Claimant as having some subsequent post-traumatic arthritis from the 1979 sports injury, but also opined that some additional arthritis was caused by the Claimant's work activities at EB. CX 7 at 13. Dr. Willetts testified that there is increasing medical literature showing that the kinds of kneeling and squatting activities that the Claimant engaged in at work are associated with accelerated degeneration of the knee. CX 7 at 16, 28. Dr. Willetts testified that the Claimant's preexisting sports injury in his left knee combined with his work activities at EB to make the left knee impairment materially and substantially greater than it otherwise would have been. CX 7 at 19. Dr. Willetts also assigned impairment ratings to the Claimant's knees based on the American Medical Association's Guide to Evaluation of Permanent Impairment ("AMA Guides"). CX 2 at 16-17. For the Claimant's left lower extremity (knee), Dr. Willetts assigned a 26% permanent partial physical impairment, attributing 22% of the impairment to the 1979 sports injury and 4% of the impairment to the Claimant's work activities at EB. CX 2 at 16. For the Claimant's right

lower extremity (knee), Dr. Willetts assigned a 7% permanent partial physical impairment, attributing 3% of the impairment to "gradual deterioration of knee joints over time, regardless of specific occupational or nonoccupational activity" and 4% of the impairment to the 1981 work injury. CX 2 at 17.

In 2005, the Claimant was examined by Dr. Paul D. Fadale, an orthopedic surgeon with Rhode Island Hospital and Associate Professor at Brown University Medical School. EX 8 at 3-4. Dr. Fadale performed a physical examination of the Claimant on November 8, 2005, and reviewed previous medical records, including x-rays of the Claimant's knees. EX 8 at 5-7. Dr. Fadale testified that the x-rays and bone scans of the Claimant's knees indicated that the Claimant has degenerative joint disease in both knees. EX 8 at 7-8. In his independent medical report and at his deposition, Dr. Fadale concluded that the Claimant's degenerative joint disease was not caused by his work at EB. EX 8 at 10; EX 6 at 2. Dr. Fadale testified that he believes that the degenerative joint disease in the Claimant's left knee was caused entirely by the 1979 sports injury. EX 6 at 2; EX 8 at 9. Additionally, it is Dr. Fadale's opinion that the arthritis in the Claimant's right knee is a result of the normal aging process and from overuse due to the Claimant compensating for the left knee condition. EX 6 at 2; EX 8 at 10. Dr. Fadale did not render an opinion as to impairment ratings because he does not believe that the Claimant has reached maximum medical improvement. EX 6 at 1-3.

Dr. Medhat A. Kader, an orthopedic surgeon retained by the Employer, reviewed medical records of the Claimant and issued a written report dated April 4, 2006. EX 9 at 1-4. Dr. Kader did not perform a physical examination on the Claimant. EX 9 at 1-4. Dr. Kader's diagnosis of the Claimant as having osteoarthritis of the knees is consistent with Dr. Willetts' and Dr. Fadale's diagnoses. EX 9 at 3. However, Dr. Kader disagrees with Dr. Willetts regarding causation, and agrees with Dr. Fadale's medical opinion that the Claimant's osteoarthritis of the knees was not work related. EX 9 at 3. Dr. Kader states in his report that the Claimant's knee condition is degenerative in nature and related to advanced age. EX 9 at 3. He further points to the non-work traumatic injury that the Claimant sustained to the left knee in 1979 and subsequent reconstructive surgery as the cause of the Claimant's post-traumatic arthritis in the left knee. EX 9 at 3. Dr. Kader states that because there is no evidence of "significant injury requiring former orthopedic treatment," the right knee condition "cannot be work related." EX 9 at 3. Although Dr. Kader did not offer an impairment rating, he agreed with Dr. Willetts that maximum medical improvement has been achieved. EX 9 at 4.

The Claimant retired from his position at EB in January 2006 due to the pain in his knees, and as of the date of hearing before this court, the Claimant has not returned to the workforce. TR at 30.

B. Causation

In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999), *Merrill v.*

Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C.Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley),* 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable. *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986).

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). *Brown*, 194 F.3d at 4. A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989).

The aggravation rule can apply to injuries which are not caused by identifiable incidents, but which are gradually produced by work activities. Such cumulative injuries are classified as accidental injuries and not as occupational diseases, and liability attaches at the point of last exposure to injurious conditions or activities. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991). The aggravation rule also applies in cases where the last aggravation combined with the underlying injury merely in an additive way and resulted in a greater overall impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). The aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 519 (5th Cir. 1986).

If a claimant's employment aggravates a non-work related underlying condition so as to produce incapacitating symptoms, the resulting disability is compensable. *Gardner v. Bath Iron Works*, 11 BRBS 556 (1979) *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). Additionally, if a work related injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the entire resultant condition is compensable. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 519 (5th Cir. 1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP,* 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co.*, 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34

BRBS 39, 41-42 (2000); *Kier,* 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18 (1995); *Sprague v. Dir., OWCP,* 688 F. 2d 862 (1st Cir. 1982).

The Claimant contends that the work injury to the right knee in 1981 and the 1979 left knee sports injury, followed by work activities which included repetitive crawling, squatting, stooping, and climbing performed over many years, caused, contributed to, accelerated or aggravated his bilateral degenerative joint disease. CX 1 at 2-3. The Claimant testified that his job required him to kneel on concrete for hours each day and to climb steel ladders to access plumbing and heating systems located in dark underground areas. TR at 37. The Claimant contends that his knees were damaged by kneeling on concrete and frequently hitting his knees on the steel rungs of ladders. TR at 37-38. In support of his prima facie case, the Claimant relies primarily on the medical opinion of Dr. Philo F. Willetts, Jr. At the request of Claimant's counsel, Dr. Willetts examined the Claimant on August 12, 2004, and reviewed the Claimant's medical records. Dr. Willetts noted that the Claimant sustained two documented work related injuries to the right knee, the later injury in May 1981 resulted in "sufficient swelling to require needle aspiration." CX 7 at 13; CX 2 at 17. Dr. Willetts diagnosed degenerative arthritis of the right knee subsequent to that 1981 work injury.

With regard to his left knee, the Claimant sustained a sports injury to his left knee in 1979 and required surgery to repair a medial collateral ligament. Dr. Willetts concluded that the Claimant had some subsequent post-traumatic arthritis as a result of the 1979 sports injury, but also opined that some of the osteoarthritis was caused by the Claimant's work activities at EB. While he acknowledged that the Claimant's left knee osteoarthritis is mainly the result of the 1979 sports injury, Dr. Willetts testified that the Claimant's preexisting sports injury combined with his work activities at EB, including squatting and kneeling which caused knee pain and added stress, and accelerated deterioration to the already damaged knee. Based on the Claimant's testimony and Dr. Willetts' medical opinion that the Claimant's work activities at EB caused the Claimant's osteoarthritis in his right knee or accelerated it following the 1981 work injury, and that the work activities combined with the preexisting 1979 sports injury to accelerate, increase or aggravate the osteoarthritis of the left knee, I find that the Claimant has shown that working conditions existed at EB that could have caused, contributed to, or accelerated his bilateral knee condition. Thus, the Claimant has established his prima facie case and has successfully invoked the Section 20(a) presumption.

The burden now shifts to the Employer to rebut the presumption with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Shorette*, 109 F.3d at 53; *Merrill*, 25 BRBS at 144. Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the Section 20(a) presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier v. Bethlehem Steel Corp*. 16 BRBS 128 (1984). The Employer contends that the Claimant's bilateral knee conditions are not causally related to his employment at EB. The Employer relies on the opinion of its medical

expert, Dr. Paul D. Fadale, an orthopedic surgeon who performed an independent medical examination and evaluation of the Claimant. EX 8 at 5; EX 6 at 1-3. Upon review of the Claimant's x-rays and bone scan, Dr. Fadale testified that the Claimant has degenerative joint disease in both knees, which is consistent with Dr. Willetts' diagnosis. However, in contrast to Dr. Willetts, Dr. Fadale opined that the Claimant's degenerative joint disease was not caused by his work at EB. Dr. Fadale attributed the Claimant's left knee degenerative joint disease to the 1979 sports injury and his early degenerative joint disease in the right knee to either overuse from his left knee injury or the normal aging process.

Consequently, Dr. Fadale testified to a reasonable degree of medical certainty that the Claimant's degenerative joint disease was not caused by his employment with EB. However, when asked his opinion as to whether the Claimant's work at EB aggravated his knee condition, Dr. Fadale stated **"**that's a much tougher question. I don't know if I can easily tell what aggravates or doesn't aggravate arthritic conditions. As I stated before, I'm looking for major traumatic events in people's life that will alter the physiology within their joints. And he didn't give me any major life-altering events." EX 8 at 11. Dr. Fadale went on to state that based on the information available to him, he did not believe that the Claimant's knee injury was aggravated at work. EX 8 at 11-12. Given the relatively low threshold required to rebut the presumption, I find that Dr. Fadale's testimony indicating that the Claimant's knee condition was not caused by occupational factors is adequate to rebut the Section 20(a) presumption.

Because I have found that the Employer has successfully rebutted the presumption that the Claimant's bilateral knee condition is work-related, the presumption no longer controls, and I must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio*, 196 U.S. at 280; *Holmes*, 29 BRBS at 18; *Sprague,* 688 F. 2d at 862. In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). *See Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979); *Grimes v. George Hyman Constr. Co.*, 8 BRBS 483 (1978), *aff'd mem*., 600 F.2d 280 (D.C. Cir. 1979); *Tyson v. John C. Grimberg Co.*, 8 BRBS 413 (1978).

In this case, both Dr. Willetts and Dr. Fadale agree that the Claimant suffers from degenerative joint disease or osteoarthritis of the knees. They disagree, however, as to whether the Claimant's work at EB caused, contributed to or aggravated his bilateral knee condition.

As the two experts have presented opposing opinions, it is necessary for me to determine which opinion is more credible. Both experts are board certified orthopedic surgeons. CX 7 at 6; EX 8 at 3. Dr. Fadale is an orthopedic surgeon with Rhode Island Hospital who is licensed to practice medicine in Rhode Island, Maryland, and Pennsylvania. EX 7 at 4. Dr. Fadale has been practicing orthopedics since 1987. EX 7 at 4. Dr. Fadale is an associate professor at Brown University School of Medicine, and is the Head Team Physician for the Rhode Island Sting Rays Soccer Team, the Providence Bruins Semi-Professional Hockey Team, and Brown University Athletics. EX 8 at 3-4; EX 7 at 5. Dr. Fadale also sits on the editorial board and is a reviewer

for several academic journals. EX 7 at 7-8. Dr. Fadale testified that he currently performs ten knee surgeries per week. EX 8 at 3-4.

Dr. Willetts is on the attending active staff at the Westerly Hospital in Rhode Island, and has a solo practice of orthopedic surgery. CX 7 at 6. He is licensed to practice medicine in Rhode Island and Connecticut, and has been practicing orthopedics since 1978. CX 7 at 6. At his deposition, Dr. Willetts testified that he was not currently performing knee surgeries and that he had not done so for "a couple of years." CX 8 at 11. However, Dr. Willetts has examined employees on behalf of the Employer for about fifteen years, has been a treating physician for EB employees since 1978, and estimates that he has examined "many hundreds of people" from EB during that time for work related injuries. CX 9 at 37-38. With regard to the assignment of impairment ratings, Dr. Willetts has been using the AMA Guides for over fifteen years in assessing permanent impairment. CX 7 at 7. He has attended several Orthopedic Academy courses and other courses regarding the best use of the AMA Guides and has personally discussed aspects of the AMA Guides with authors of the various chapters in the Guides. CX 7 at 7. Additionally, Dr. Willetts has lectured to the Donley Rehabilitation Center and to the Westerly Hospital staff on the use of the AMA Guides. CX 7 at 7.

As a medical school professor and semi-professional sports team physician who performs knee surgeries weekly, Dr. Fadale would necessarily be aware of the most current medical theory and practice and he is highly qualified. While Dr. Willetts has practiced orthopedics for almost thirty years, he is no longer performing knee surgeries. It appears that Dr. Fadale has an edge in terms of qualifications. However, in determining which expert's opinion on causation is more credible, I must consider the evidence and the rationale supporting their respective opinions.

In support of his medical opinion, Dr. Willetts explained that the Claimant suffered a work-related trauma to the right knee in 1981 and that work activities including prolonged kneeling and squatting for many years following the knee injury contributed to the development of degenerative joint disease or osteoarthritis. As for the left knee, Dr. Willetts acknowledged a significant non-work-related sports injury in 1979 requiring surgery and stated that the left knee osteoarthritis was largely the result of the 1979 injury, but that work activities accelerated or aggravated the osteoarthritis. Dr. Willetts reported that the findings from epidemiological studies indicate that deterioration of the knees is accelerated in individuals who have "knee intensive jobs or activities such as squatting and kneeling..."[3] CX 7 at 17. He further stated that "the literature over the last few years does indeed make significant links between certain types of stressful activity, such as prolonged kneeling or squatting or heavy lifting…to show a good contribution from that kind of activity to the development of osteoarthritis."[4] CX 8 at 12.

[3] Dr. Willetts indicated that the primary study supporting this position is "Occupational Physical Demands, Knee Bending, and Knee Osteoarthritis: Results from the Framingham Study," Felson, *et al*, Journal of Rheumatology, 1991. CX 7 at 29.

[4] In addition to the Framingham Study, Dr. Willetts also specifically referenced "Osteoarthritis of the Knee: A Compendium of Evidence-based Information and Resources." American Academy of Orthopaedic Surgeons, Sept. 2002; "Occupational Physical Activities and Osteoarthritis of the Knee." David Coggon *et al*, Arthritis & Rheumatism, Vol. 43, No. 7, July 2000; and Kelley's Textbook of Rheumatology, 6th Edition, 2001. CX 8 at 12-13.

With regard to the studies cited by Dr. Willetts to support his opinion on causation, Dr. Fadale comments that "orthopedics is trying to change the culture of the literature that we are writing" and remarks that the studies referenced by Dr. Willetts "may or may not be acceptable in the future of orthopedic writing" depending on the scientific validity of the studies. EX 8 at 15. Nevertheless, Dr. Fadale was unable to state that the four articles specifically referenced by Dr. Willetts would not be published today under stricter standards being employed, rather that they "*may* not have been published with today's standards." EX 8 at 15-16 (emphasis added). While Dr. Fadale is critical of these studies, neither he nor the Employer points to any studies with contrary view.[5] In addition, Dr. Fadale concluded that the left knee osteoarthritis is the result of the 1979 injury and the right knee osteoarthritis is the result of compensating for the left knee injury or the aging process, and so neither knee condition was work-related. As noted above, under the aggravation rule if a non-work-related underlying condition is aggravated by employment activities, the resulting disability is compensable and if a work-related injury aggravates, exacerbates, accelerates or combines with a previous underlying condition, the entire resulting condition is compensable. Dr. Fadale did not discuss whether the Claimant's extensive and prolonged kneeling and squatting for twenty-five years following the left knee injury aggravated or accelerated the development of osteoarthritis. Presumably, the left knee injury requiring surgery is the type of "major traumatic event" that would "alter the physiology" within the knee, which Dr. Fadale stated he looks for in determining whether work activities may aggravate an arthritic condition.

I find that Dr. Willetts' opinion that repetitive kneeling and squatting subsequent to a traumatic knee injury can cause, contribute to or aggravate osteoarthritis is supported by the studies and common sense. Moreover, Dr. Willetts' opinion that repetitive kneeling and squatting following a traumatic knee injury can cause, contribute to or aggravate osteoarthritis is consistent with Dr. Fadale's view that he looks for major traumatic events in an individual's life that will alter the physiology within their joints when attempting to evaluate whether overuse following such a traumatic injury may contribute to the development of osteoarthritis in the joint.

Each party also attempts to undermine the other party's medical expert by pointing to prior cases in which the expert allegedly gave an opinion on causation that is contrary to the opinion provided in the present matter. For example, the Claimant contends that Dr. Fadale's opinion with regard to the factors causing or contributing to osteoarthritis in the present matter is inconsistent with opinions he provided in two other cases involving osteoarthritis of the knee. *Legacy v. Electric Boat Corporation*, 2004-LHC-2275, 2004-LHC-2276, Dec. 23, 2004 (ALJ); *DesGranges v. Electric Boat Corporation*, 2002-LHC-00129, June 19, 2002; 2003-LHC-00783, June 19, 2003; 2004-LHC-01527, Nov. 15, 2004 (ALJ).

In *Legacy v. Electric Boat*, the claimant, a pipefitter at Electric Boat, sustained a left knee injury at work in 1989. *Legacy* at 2; CX 9, Exh. 1 at 3. After two knee surgeries, the claimant returned to his usual employment on an unrestricted, full-duty basis, which required him to crawl on steel surfaces, squat and stoop in carrying out his duties. *Legacy* at 2; CX 9, Exh. 1 at 3. The claimant's physician diagnosed the claimant as having osteoarthritis of the left knee and

[5] Dr. Fadale does refer generally to some studies that indicate a reduced incidence of arthritis in runners and rowers, but does not cite to any specific studies by name or to any studies that address the relationship between osteoarthritis of the knee and activities such as kneeling and squatting. EX 8 at 14.

explained that it was post-traumatic arthritis caused by his previous injury and aggravated by his work activities such as crawling and stooping. *Legacy* at 4-5; CX 9, Exh. 1 at 5-6. Dr. Fadale examined the claimant in *Legacy*, and concluded that "although there has been no trauma, the heavy demands of work appear to have been aggravating his known degenerative condition. Therefore it appears his left knee complaints are related to his original work-related injury almost 15 years ago." *Legacy* at 5; CX 9, Exh. 1 at 11, 15.

According to Dr. Fadale's Independent Medical Examination report in *DesGranges v. Electric Boat*, the claimant in *DesGranges* also worked as a pipefitter for Electric Boat and had been diagnosed as having degenerative joint disease in both of his knees. CX 9, Exh. 2 at 4. In his report, Dr. Fadale stated that he was "unaware of any literature indicating that overuse activity as a pipefitter will result in bilateral degenerative joint disease," and concluded that, with the information he had, he could not attribute the claimant's condition to a work related injury. CX 9, Exh. 2 at 4. However, in a Memo/Brief Office Note dated July 10, 2002, Dr. Fadale states that "…commonsense would indicate that patients who aggressively 'overuse or abuse' their symptomatic arthritic joints would have a quicker worsening of symptomatology then [sic] patients who 'rest' their arthritic symptomatic joints. Therefore, while there is no direct cause and effect from work and arthritis, there are other co-morbidities that play a role in defining a patients [sic] discomfort level. As noted in this patient, his work activity level is one co-morbidity that may worsen his symptomatology." CX 9, Exh. 2 at 6.

Read together, the medical opinions Dr. Fadale provided in *Legacy* and *DesGranges* reveal that Dr. Fadale is willing to acknowledge that overuse or work activities such as extensive kneeling and crawling can contribute to the development of or aggravate osteoarthritis if the individual has experienced a prior traumatic injury to the knee. In the present matter, Dr. Fadale's opinion ignores the evidence of record that the Claimant did sustain a non-work traumatic injury to his left knee in 1979 and sustained a work-related injury to his right knee in 1981 that was significant enough to cause swelling and require aspiration. In addition, in determining that the Claimant's employment activities did not contribute to his bilateral osteoarthritis in this case, Dr. Fadale abandons the rationale he employed in *Legacy* and *DesGranges* where he concluded that work activities did contribute to the development of osteoarthritis. Dr. Fadale's opinion herein is undermined because the basis for his opinion that the Claimant's work did not cause or aggravate his knee condition is inconsistent with the rationale he employed in finding similar work did or may contribute to osteoarthritis in *Legacy* and *DesGranges*.

The Employer asserts that Dr. Willetts opinion in the present case is contrary to the opinion he offered in *Swan v. Electric Boat*. *Swan v. Electric Boat*, 2002-LHC-1284, 2002-LHC-1285, Feb. 20, 2003 (ALJ). Employer's Brief ("Em. Brf.") at 19. In *Swan*, the claimant alleged, among other injuries, injury to the knee (osteoarthritis). The claimant presented no evidence of trauma to the knee and instead, contended that work activities including crawling caused his knee condition. *Swan* at 3-6. Dr. Willetts opined that the claimant's osteoarthritis of the knees "was the result of normal aging and was not accelerated, hastened, or changed by his employment activities." *Swan* at 12. Dr. Willetts further opined that "crepitus is not caused by kneeling on hard surfaces, which is an 'every day act of life,'…It is 'inappropriate to try to link that with the chance observation of some knee abnormalities later in life.'" Em. Brf. at 20; *Swan*

at 14. However, as the *Swan* decision expressly notes, Dr. Willetts explained that "his opinion might be affected by evidence 'of sufficient force of a bang to cause some visible swelling that persists and causes [claimant] to go back a few times over the course of a couple of weeks or more. That would be sufficient…to say that it may have damaged the cartilage behind the bone.'" *Swan* at 13. Contrary to the facts of the *Swan* case, the evidence in the present case establishes that the Claimant did suffer a traumatic sports injury to his left knee in 1979 and a work related contusion to his right knee in 1981 that required fluid to be aspirated from the knee.

Read fairly, Dr. Willetts' opinion in *Swan* clearly suggests that had there been evidence of some traumatic injury to the knee in that case, he may well have concluded that work activities including kneeling could have caused or aggravated the knee condition. Similarly, in the present case, Dr. Willetts noted work-related trauma to the right knee requiring aspiration in 1981 and a traumatic left knee injury which was not work-related but required surgery. Following the right and left knee injuries, Claimant worked for some twenty-five years engaged in repetitive kneeling, crawling, and climbing which aggravated his knee condition. Given the difference in facts between these two cases and Dr. Willetts' discussion in *Swan* of the type of injury that could contribute to osteoarthritis of the knee, I find that the rationale or reasoning underlying Dr. Willetts' opinions in the two cases is consistent.

The Employer also argues that the present matter is similar to the matter of *Nigrelli v. Electric Boat*, which also addressed the issue of causation with regard to a claimant's osteoarthritis of the knee. Em. Brf. at 18. *Nigrelli v. Electric Boat*, 2004-LHC-02277, Oct. 12, 2005 (ALJ). In *Nigrelli*, the undersigned administrative law judge found that the claimant's arthritis was not work related, however, the *Nigrelli* matter is distinguishable from the present case. Unlike the Claimant in the present case who sustained a work related contusion to the right knee requiring fluid to be aspirated and resulting in light duty for a couple of days and a traumatic non-work related injury requiring surgery, the claimant in *Nigrelli* reported that "he never experienced a traumatic injury to the knee…his knee never swelled, and he never lost any time from work due to his pain." *Nigrelli* at 2-3. Furthermore, in *Nigrelli*, I found the claimant's physician was less credible than the employer's physician because the claimant's physician did not reference any medical or scholarly evidence of the "micro-trauma theory" that the claimant was advancing in that case. *Nigrelli* at 6-7. Additionally, in *Nigrelli* the medical records indicated that the claimant's physician "contradicted his testimony regarding the causal relationship between the claimant's disability and his work," because he indicated on a temporary disability insurance form that the claimant's knee condition was "not work-related." *Nigrelli* at 7.

In the present matter, Dr. Willetts' medical opinion is supported by the objective evidence, as well as the studies that he has cited, and the theory underlying his opinion here is consistent with the theory he used in rendering his opinion on causation in the *Swan* case and with common sense. In contrast, Dr. Fadale was unable to cite any studies which were inconsistent with the studies Dr. Willetts relied upon. More importantly though, Dr. Fadale failed to account for the work-related trauma to the Claimant's right knee and the non-work-related traumatic injury to his left knee in concluding that the Claimant's bilateral osteoarthritis was not contributed to, accelerated, exacerbated or aggravated by twenty-five years of extensive kneeling and crawling required at work, and Dr. Fadale's explanation in concluding the

Claimant's knee osteoarthritis is not related to his work, is inconsistent with the rationale he applied in determining that the osteoarthritis suffered by the claimants in *Legacy* and *DesGranges* may be contributed to by work activities. These deficiencies and inconsistencies undermine Dr. Fadale's opinions in the present matter. After carefully considering all of the evidence and the two physician's opinions, I credit Dr. Willetts opinion over that of Dr. Fadale on the issue of causation in this case.[6] Accordingly, I find that the osteoarthritis in the Claimant's right knee was caused or accelerated by his work activities at EB. I also find that the osteoarthritis in the Claimant's left knee was aggravated by his work activities at EB. Therefore, the Claimant has shown that his bilateral osteoarthritis of the knees is caused, contributed to or aggravated by his employment at Electric Boat.

C. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

There are two tests for determining whether a disability is permanent. Under the first test, a Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir.1968) *cert. denied* 394 U.S. 976 (1969); *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In this matter, there is no dispute as to the date the Claimant reached maximum medical improvement, as the parties stipulate that the Claimant reached maximum medical improvement on September 24, 2004. TR at 5. A residual disability, either partial or total, will be considered permanent if, and when, the employee's condition reaches a point of maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). Since it is undisputed

[6] Dr. Kader performed a records review of the Claimant's knee condition, but he did not examine the Claimant. In addition, like Dr. Fadale, Dr. Kadar did not appear to consider whether the Claimant's work activities following the injuries to the right and left knee could have accelerated or aggravated his osteoarthritis. Therefore, I accord Dr. Kader's opinion little weight.

that Claimant has reached a state of maximum medical improvement, Claimant's disability is permanent in nature as of September 24, 2004.

Additionally, there is no dispute that the Claimant's disability is partial as Dr. Willetts assessed a 7% permanent impairment for the right knee and a 26% permanent impairment for the left knee. Dr. Fadale did not provide an impairment rating for either knee. No evidence of total disability has been submitted.

D. Compensation Due

Based on the foregoing findings, the Claimant is entitled to permanent partial disability compensation pursuant to Section 8(c)(2), 33 U.S.C. § 908(c)(2), for a 26% permanent impairment of the left lower extremity (knee) for a period of 74.88 weeks in an amount equal to 66 2/3 percent of his stipulated average weekly wage of $789.16. Additionally, the Claimant is entitled to compensation for a 7% permanent impairment of the right lower extremity (knee) for a period of 20.16 weeks in an amount equal to 66 2/3 percent of his stipulated average weekly wage of $789.16. Pursuant to Section 8(c)(22), 33 U.S.C. § 908(c)(2), the awards will run consecutively.

E. Medical Care

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). I have determined that the Claimant's knee condition is related to his work at Electric Boat. The Claimant is, therefore, entitled to medical care for the condition. As the responsible party, the Employer Electric Boat in the instant matter thus remains liable for this Claimant's medical benefits. Accordingly, I conclude that the Employer shall pay the Claimant for medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related knee condition. *Colburn v. General Dynamics Corp.,* 21 BRBS 219, 222 (1988).

F. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file a fee petition. My Order will the Employer 15 days from the entry of the Claimant's fee petition to file any objection.

G. Conclusion

In sum, I have found that the Claimant's left knee condition was aggravated by his work for the Employer, and the Claimant's right knee condition was caused by his work for the Employer. The Claimant is entitled to compensation under the Act. For the left knee, the Claimant is entitled to permanent partial disability compensation for a 26% impairment for a period of 74.88 weeks. The Claimant is also entitled to permanent partial disability

compensation for a 7% impairment of the right knee for a period of 20.16 weeks. The Claimant is also entitled to reasonable and necessary medical care for his knee condition.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1) The Employer shall pay to the Claimant permanent partial disability benefits pursuant to 33 U.S.C. § 908(c)(2) for a 26% permanent impairment to the left knee beginning on September 24, 2004 for a period of 74.88 weeks in an amount equal to 66 2/3 percent of his stipulated average weekly wage of $789.16;

2) The Employer shall pay to the Claimant permanent partial disability benefits pursuant to 33 U.S.C. § 908(c)(2) for a 7% permanent impairment to the right knee beginning on September 24, 2004, for a period of 20.16 weeks in an amount equal to 66 2/3 percent of his stipulated average weekly wage of $789.16;

3) The awards for permanent partial disability benefits shall run consecutively pursuant to 33 U.S.C. § 908(c)(22);

4) The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's employment related knee condition may require pursuant to 33 U.S.C. § 907;

5) The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any response;

6) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts